UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Strategic Partners, Inc., Plaintiff v. Koi Designs, LLC, Defendant.	Case No. 2:17-cv-00236-TJH (GJSx) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This Report and Recommendation is submitted to United States District Judge Terry J. Hatter Jr., pursuant to 28 U.S.C. § 636 and General Order No. 05-07 of the United States District Court for the Central District of California. For the reasons that follow, the Court recommends that both of Plaintiff's Sanctions Motions be GRANTED, as discussed further below.

INTRODUCTION

This case was filed and served in January of 2017. [Dkt. 1, 9.] Since that time, Defendant Koi Design, LLC ("Koi") and its counsel have repeatedly and unrepentantly failed to engage in the discovery process mandated by the Federal Rules of Civil Procedure, this District's Local Rules, and the procedures of the undersigned Magistrate Judge. Koi has also – again, repeatedly – violated this Court's orders. And this behavior has continued despite repeated verbal and written

warnings from the Court. Based on the facts set forth below, the Court can only conclude that this behavior is willful, and warrants severe sanctions.

Plaintiff Strategic Partners, Inc. ("Strategic" or "Strategic Partners") has filed two motions for sanctions. The first seeks fees and costs in the amount of $26,615.02 incurred by Strategic Partners in bringing certain discovery disputes to the Court's attention beginning in July 2017. [Dkt. 43 ("First Sanctions Motion").] The second seeks terminating or preclusionary sanctions for Koi's failure entirely to participate in good faith in discovery and for Koi's violation of various Court orders and requirements throughout the case. [Dkt. 49 ("Second Sanctions Motion").] This Report and Recommendation is submitted to the District Judge to address both Motions.

FACTUAL BACKGROUND

As noted above, this case was filed and served in January 2017. [Dkt. 1, 9.] Strategic Partners stipulated to an extension of time to March 2, 2017 for Koi to answer. [Dkt. 13.] Thereafter, the Honorable Beverly Reid O'Connell set the case for a scheduling conference on May 15, 2017. [Dkt. 17.] Koi's colors began to show immediately. Despite several attempts by Strategic Partners (four e-mails over the course of two weeks) to get Koi to participate in the required conference of counsel prior to the scheduling conference, Strategic Partners got no response from Koi. Strategic Partners brought this problem to the District Judge's attention on April 18, 2017 [Dkt. 19], and Koi still did not respond – to Strategic or the Court. Strategic Partners timely filed a solo Rule 26(f) report a few weeks later. [Dkt. 20, filed May 8, 2017.] Only then, four days after Strategic's filing and three days before the scheduling conference, did Koi make a peep, filing an *ex parte* request to continue the scheduling conference. [Dkt. 22.] In the *ex parte*, Koi's counsel, A. Douglas Mastroianni, confessed that the "failure to participate in the Rule 26 Conference and preparation of the Joint Report" was solely his error, and that he "took responsibility" and "believe[d] he [could not] credibly object to the issuance

of a reasonable monetary sanction" for his behavior. [*Id.* at 2.] The District Court chose not to sanction counsel at that time, but counsel was clearly on notice that such continued "error" would not be tolerated. Strategic Partners opposed the *ex parte* request, in part because its counsel is located in San Francisco and arrangements had been made to attend the scheduling conference here in Los Angeles. Judge O'Connell held the scheduling conference as originally planned and entered an Order for Civil Jury Trial, which set the original discovery cutoff in this case for December 25, 2017.[1]

This case first came to the attention of the undersigned Magistrate Judge on July 28, 2017, when Strategic Partners filed an *ex parte* application seeking relief from the Court's discovery procedures, which required the parties to meet and confer and then jointly propose times for a pre-discovery motion teleconference prior to the filing of motion papers. [Dkt. 32.] Strategic's application set forth how Koi failed to timely respond to document requests and interrogatories that were propounded in May 2017, and that when belated responses were finally received they contained only boilerplate objections. Strategic sent multiple letters and e-mails requesting that Koi's counsel meet and confer, which were ignored by Koi's counsel except for an occasional empty promise – never satisfied – that verifications and supplemental responses would be provided. Strategic's counsel also requested dates for depositions of Koi's witnesses, which were also ignored by Koi's counsel.

Ultimately, Koi's counsel refused to participate in a meet and confer session, and also failed to provide – as required by this Court's procedures – dates he was available to participate in a telephonic conference with the Court. Strategic Partners was forced to file its *ex parte* application, and provided evidence of its attempts to

[1] The Honorable Beverly Reid O'Connell passed away during the pendency of the disputes giving rise to the instant sanctions motions. The case was transferred to the Honorable Terry J. Hatter, Jr. on December 11, 2017. Judge Hatter continued the discovery cutoff to April 24, 2018 on December 11, 2017 given the state of discovery and the sanctions motions, which had been filed by that time. [Dkt. 60.]

engage Koi's counsel in discussions about the interrogatories and document requests, to get dates for depositions, or to obtain counsel's availability for a conference with the Court. [Dkt. 32 and attachments.] Koi's counsel did not respond to the *ex parte* application, either by contacting Strategic or filing an opposition with the Court. Rather than grant the application, however, the Court chose to issue a minute order requiring the parties to appear telephonically on August 3, 2017, and included an Order to Show Cause ("OSC") why Koi "should not be sanctioned for failure to participate in the meet and confer process as required by both the Local Rules of this District and this Court's procedures regarding discovery." [Dkt. 33.]

The Court conducted the hearing on August 3, 2017. Koi's counsel apologized to the Court and counsel for his failure to engage prior to the Court's intervention, and promised that there would be no problems in the future. Based on counsel's representation, the Court discharged the OSC. The Court then advised Koi's counsel on the record that any further failures to engage with opposing counsel or delay tactics would not be tolerated. The Court specifically counseled the parties that they ***must*** comply with the Court's schedules and procedures, which set forth specific time limits within which counsel must respond to e-mail or other written correspondence related to discovery disputes. The parties were then ordered to meet and confer on the issues about which Plaintiff had been trying to get Defendant's counsel's attention, and the Court set a further telephonic hearing for August 8, 2017. [Dkt. 34.]

Unfortunately, the Court's admonitions to Koi's counsel fell on deaf ears. Koi's counsel failed to appear on the August 8 call. The Court therefore set a briefing schedule for the issues Strategic Partners wished to raise, and issued another OSC, this time regarding the failure of Koi's counsel, Mr. Mastroianni, to appear. Mr. Mastroianni filed a declaration stating that he had miscalendared the hearing. [Dkt. 38.] The Court did not impose sanctions at that time. [Dkt. 42.]

In accordance with the briefing schedule, Strategic filed its motion to compel. Koi did not file an opposition. Rather, Koi filed only the declaration of its Executive Vice President of Operations, Jeremy Husk, which demonstrated that there was no substantial basis for Koi's failure to provide discovery. Nor was there any explanation, in either the Husk declaration or the Mastroianni declaration addressing the OSC, as to why Koi did not engage with the other side. The Court thereafter found that Koi had "refused to engage in meaningful dialog," among other violations of the Federal and Local Rules, and granted Strategic's motion. [Dkt. 42.] The Court overruled Koi's boilerplate objections, and Koi was ordered to provide supplemental responses by October 12, 2018 and responsive documents by October 16, 2018. [*Id*.] And because of Koi's "failure to participate in discovery and its 'opposition' to the . . . motion," did "not appear to have a substantial basis in law or fact," the Court invited Strategic to file a motion for monetary sanctions. [*Id.*] Koi was "**required**" to file an opposition to the motion by October 23, 2017. [*Id*. (emphasis in original).]

Strategic filed its motion for monetary sanctions in the amount of $26,615.02 on October 16, 2017. [Dkt. 43] In violation of the Court's order, Koi failed to file any response. In addition, Koi failed to provide Strategic with the Court-ordered discovery. Strategic detailed Koi's complete failure to comply with the Court's October 3 Order in its request for leave to file a motion for terminating sanctions. [*See* Dkt. 46 and supporting evidence.] And Koi again began evading and avoiding opposing counsel's attempts to engage in any sort of dialog. [*Id.*] Given: (1) the pendency of the first sanctions motion; (2) that the facts leading to Strategic's desire to file a second sanctions motion were a continuation of the facts supporting the initial motion; and (3) the undersigned's familiarity with the case, the District Judge referred the matter to the Magistrate Judge for a Report and Recommendation. [Dkt. 61.] The Court set a briefing schedule, again requiring Koi to file a brief or

statement of non-opposition. [Dkt. 48 (noting that the matter would stand submitted as of November 28, 2017).]

Koi filed its opposition on November 28, 2018. [Dkt. 52.] The two-and-a-half page Memorandum of Points and Authorities does not address any of the legal or factual points made in either of Strategic Partner's sanctions motions. Notably, not a single case or other authority is cited for any proposition. Rather, Koi tries to rationalize the company's behavior – essentially arguing "no harm, no foul" – by addressing the substantive merits of the trademark dispute and the underlying discovery at issue. [*Id.*] Koi's argument misses the point, in addition to being several months too late. Whether the marks at issue are protectable or similar might have been relevant to a determination of the underlying discovery disputes (breadth of document requests, for example), ***if*** Koi had engaged in discovery and the dispute resolution procedures in the first place. Nevertheless, Koi did not. In addition, Koi's *post hoc* declaration that Strategic's discovery was "misguided," and that this somehow allowed Koi to ignore it completely, is disingenuous in the extreme. [Dkt. 50 (Husk Declaration in support of opposition] at ¶ 9.] In sum, Strategic Partner's factual allegations contained in both of its sanctions motions – which are supported by admissible evidence – remain unrebutted by Koi. And Strategic's legal points, too, are unaddressed.[2]

In light of the pendency of two sanctions motions and the repeated oral and written admonitions of the Court, the undersigned expected that Koi and its counsel would finally engage with Strategic in discovery. Unfortunately, that was not to be

[2] Mr. Mastroianni attempts to again "fall on his sword" in his declaration in support of Koi's opposition, stating that "any failure to comply with the court's order is my own fault and not the fault of Koi or any of its employees." [Dkt. 51, ¶6.] While it is clear to the Court that Mr. Mastroianni bears much of the fault for Koi's behavior, the Husk declarations filed throughout the case, the passage of so much time, and Koi's failure to attend to case requirements even after several warnings lead the Court to conclude that the company is also at fault. Any sanctions approved by the District Court should be borne by both the company and counsel.

the case. On December 1, 2017, Plaintiff filed an *ex parte* application for leave to file another motion to compel. [Dkt. 53.] Strategic averred that Koi had again failed to respond to discovery and to requests to meet and confer. [*Id.*] At that time, the original discovery cutoff in this case had not been extended, so there was insufficient time for briefing and decision on the motion, as required by the original scheduling order in this case, for the Court to allow the motion. However, because Strategic had presented evidence of continued discovery misconduct, the Court ordered Koi to file a declaration no later than December 8, 2017, addressing Strategic's allegations. [Dkt. 56.] The Court was very specific about what Koi was required to address, "i.e., whether or why they did not respond to Plaintiff's e-mails." [*Id.*] Koi filed the declaration of its counsel December 8, 2017, stating that Koi had served discovery responses (admitting that they were both late and served without a verification, as ordered), but the declaration did not address the single factual issue to which the Court ordered a response. [*Id*.] Koi thus violated yet another Court order, and, by its silence, admitted that it had – yet again – violated the Federal Rules of Civil Procedure, the Local Rules of this District, and the Procedures of the undersigned Magistrate Judge.

GOVERNING STANDARD

I. Fee Shifting Under Rule 37(a)

If a discovery motion is granted or disclosure or requested discovery is provided only after the filing of a motion, "the court ***must***, after giving an opportunity to be heard, require the party . . . whose conduct necessitated the motion, the party or attorney advising the conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Fed. R. Civ. P. 37(a)(5)(A) (emphasis added). The exceptions to this rule are if (1) the moving party did not first, in good faith, seek to obtain the discovery prior to filing the motion; (2) the "opposing party's nondisclosure, response, or objections was

substantially justified"; or other circumstances make an award unjust. Fed. R. Civ. P. 37(a)(5)(A)(i)-(iii).

II. The General Rules Regarding Sanctions For Violation Of Discovery Orders – Rule 37(b) And The Court's Inherent Powers

Under Rule 37(b)(2)(A) of the Federal Rules of Civil Procedure and pursuant to their inherent power to control the cases before them, federal district courts are authorized to issue sanctions based upon noncompliance with a discovery order. *See Chambers v. Nasco, Inc.*, 501 U.S. 32, 49 n.14 (1991); *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958); *see also Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006) (noting that the district court's "two sources of authority" are its "inherent power to levy sanctions in response to abusive litigation practices" and Rule 37).

Under Rule 37(b)(2)(A), this Court may make such sanction orders as are "just" when a party has failed to comply with a discovery order. These include orders precluding a disobeying party from introducing designated matters into evidence, striking a pleading, and/or rendering a default judgment. *See* Fed. R. Civ. P. 37(b)(2)(A)(ii)&(v); *see also Roadway Express v. Piper*, 447 U.S. 752, 763 (1980). The type of sanction ordered is within a district court's discretion. *Von Brimer v. Whirlpool Corp.*, 536 F.2d 838, 844 (9th Cir. 1976).

If the sanction ordered is less than and/or is not tantamount to dismissal, the disobeying party's noncompliance need not be proven to be willful or in bad faith. *See, e.g., Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 589 (9th Cir. 1983). The presence or absence of a disobeying party's willfulness or bad faith "is relevant to the choice of sanctions rather than to the question whether a sanction should have been imposed." *Marquis v. Chrysler Corp.*, 577 F.2d 624, 642 (9th Cir. 1978); *see also Societe Internationale*, 357 U.S. at 208 (because Rule 37 requires only a failure to obey an order and not a refusal, whether the disobeying party's conduct was willful or not is "relevant only to the path which the District Court might follow in

dealing with" the failure to comply). "In view of the range of sanctions available, even negligent failures to allow reasonable discovery may be punished." *Marquis*, 577 F.2d at 642; *see also David v. Hooker*, 560 F.2d 412, 419-20 (9th Cir. 1977).

It is well-established that "[b]elated compliance with discovery orders does not preclude the imposition of sanctions." *North American Watch Corp. v. Princess Ermine Jewels*, 786 F.2d 1447, 1451 (9th Cir. 1986). As the Ninth Circuit has explained, the "[l]ast-minute tender of documents does not cure the prejudice to opponents nor does it restore to other litigants on a crowded docket the opportunity to use the courts." *Id.*; *see also Fair Housing of Marin v. Combs*, 285 F.3d 899, 905-06 (9th Cir. 2002)(rejecting defendant's argument that sanctions should not have been entered against him because he eventually produced the documents at issue); *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 354 (9th Cir. 1995) ("This court has squarely rejected the notion that a failure to comply with discovery rules is purged by belated compliance."); *G.K. Properties v. Redevelopment Agency of San Jose*, 577 F.2d 645, 647-48 (9th Cir. 1978) (discussing the harm to both the opposing party and litigants in other cases caused by disregard of discovery obligations and orders).

For example, in *G.K. Properties*, the Ninth Circuit affirmed the district court's decision to dismiss the case as a discovery sanction for the plaintiffs' failure to provide the requested documents by the court ordered deadline. 577 F.2d at 647. Although the plaintiffs produced the information three days before the hearing on the defendants' motion for sanctions, the Ninth Circuit concluded that the district court "acted properly" and that the plaintiffs' "last-minute tender of relevant documents could not cure the problem they previously had created." *Id.* It agreed with the district court that continuing the trial date and imposing a fine would not be an effective sanction, because it would "introduce into litigation a sporting chance theory encouraging parties to withhold vital information from the other side with the hope that the withholding may not be discovered and, if so, that it would only result

in a fine." *Id.*

Similarly, in *Payne v. Exxon Corp.*, 121 F.3d 503 (9th Cir. 1997), the Ninth Circuit affirmed the district court's dismissal of plaintiff's claims as a discovery sanction for plaintiffs' repeated failure to fully comply with discovery and with court orders directing compliance. In *Payne*, the plaintiffs offered, in their response to the defendants' motion for terminating sanctions, as Defendant has done in this case, to submit additional depositions and meet and confer with opposing counsel about any additional information sought. The Ninth Circuit agreed with the district court that "[p]laintiffs' behavior is contrary to the public interest in expeditious completion of litigation, interferes with the sensible management of this court's docket…and prejudices the defendants." 121 F.3d at 505-06. "The issue is not whether [defendants] eventually obtained the information that they needed, or whether plaintiffs are now willing to provide it," the Ninth Circuit wrote, "but whether plaintiffs' repeated failure to provide documents and information in a timely fashion prejudiced the ability of [defendants] to prepare their case for trial." *Id.* at 508.

> Many of the discovery responses eventually tendered by the plaintiffs came only as the discovery period was drawing to a close, or after it had already closed. [Defendants] were therefore deprived of any meaningful opportunity to follow up on that information, or to incorporate it into their litigation strategy. We agree with the district court that the prejudice factor favors dismissal in this case.

Id. (internal citations omitted).

Finally, in considering whether to impose sanctions, a district court may consider all of the disobeying party's discovery misconduct. *Payne*, 121 F.3d at 508; *Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1411 (9th Cir. 1990).

III. Terminating Sanctions

In contrast with less severe sanctions, terminating sanctions may be imposed only if there has been "willfulness, bad faith, or fault" by the party who has

disobeyed a discovery order. *See, e.g.*, *Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th Cir. 2007). This standard is met by a showing of "disobedient conduct not shown to be outside the control of the litigant." *Henry v. Gill Industries*, 983 F.2d 943, 948-49 (9th Cir. 1993) (internal citation omitted); *see also In re Phenylpropanolamine (PPA) Products Liab. Litig.*, 460 F.3d 1217, 1233 (9th Cir. 2006).

In the Ninth Circuit, upon a finding of "willfulness, bad faith, or fault," a court must assess the following five factors to decide if terminating sanctions should be imposed: (1) the public's interest in the expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring the disposition of cases on their merits; and (5) the availability of less drastic sanctions. *See, e.g.*, *Valley Eng'rs Inc. v. Elec. Engineering Co.*, 158 F.3d 1051, 1057 (9th Cir. 2008); *Adriana*, 913 F.2d at 1412-13 (noting that this five-factor test is a balancing test). When a court order has been violated, the first two factors support imposing terminating sanctions and the fourth factor "cuts against" them, and thus, the third and fifth factors are decisive. *Id.* at 1412; *see also Wanderer v. Johnson*, 910 F.2d 652, 656 (9th Cir. 1990) ("The first two of these factors favor the imposition of sanctions in most cases, while the fourth cuts against a default or dismissal sanction. Thus the key factors are prejudice and availability of lesser sanctions.").

The third factor—prejudice—is satisfied if the disobeying party's actions impair the ability of the moving party "to go to trial" or "threaten to interfere with the rightful decision of the case." *Adriana*, 913 F.2d at 1412. Although mere delay alone does not establish prejudice, a failure to produce documents, as ordered, "is considered sufficient prejudice." *Adriana*, 913 F.2d at 1412.

Under the fifth factor, a district court must consider the impact of the terminating sanction sought and the adequacy of less drastic sanctions. *Adriana*, 913 F.2d at 1412. Whether or not the district court warned a disobeying party of the

possibility of dismissal is relevant, but "an explicit warning is not always necessary" for a dismissal order to be proper. *Id.* at 1412-13. As the Ninth Circuit explained in *Valley Engineers*, *supra*, "the central factor in evaluating the district court order is justice, and everyone has notice from the text of Rule 37(b)(2) that dismissal is a possible sanction for failure to obey discovery orders." 158 F.3d at 1056-57. The five-part test is used "to determine whether a dismissal sanction is 'just,' " but notwithstanding the fifth factor, "it is not always necessary for the court to impose less serious sanctions first, or to give any explicit warning." *Id.* at 1057 (characterizing the five-part test as "a way for a district judge to think about what to do, not a series of conditions precedent before the judge can do anything").

DISCUSSION

I. First Sanctions Motion – Fee Shifting Is Appropriate Because Koi's Opposition To The Motion To Compel Was Not Substantially Justified

Strategic Partners' First Sanctions Motion [Dkt. 43] seeks $26,615.02 in fees and costs incurred in filing and arguing its motion to compel production of documents and supplemental responses to various discovery requests. Despite its repeated good faith efforts, Strategic Partners had been unable to get Koi's attention to address any of the issues it wished to raise prior to the filing of the motion. It could not even get Koi's attention to its e-mails requesting available times – as required by this Court's Procedures and Schedules – to have a pre-discovery motion teleconference with the Court. Strategic was forced to file an *ex parte* application (to which Koi also failed to respond) so that the Court would be aware of the dispute and order Koi to participate in a telephonic hearing.

After the Court conducted the telephonic hearing, it gave Koi another chance to meet and confer about the issues Strategic Partners had raised, and set a further telephonic conference if any issues remained. [Dkt. 34.] Issues did remain, yet Koi's counsel failed to appear for the further hearing. The Court set a briefing schedule for the remaining issues that required Koi's participation. [Dkt. 35.]

In compliance with the Court's order, Strategic's motion was filed on August 15, 2017. Koi failed to oppose it properly, filing only brief declarations of counsel and Mr. Husk (without an accompanying memorandum of points and authorities), neither of which demonstrated that there was any merit to Koi's legal position, factual assertions, or litigation behavior. As the Court noted in its October 3, 2017 Order granting Strategic's motion to compel, Strategic had raised several specific issues, none of which were addressed in the Mastroianni or Husk declarations. Mr. Husk simply declared, without basis, that Koi had fulfilled its obligations – with a few exceptions. The declaration explained that Koi decided unilaterally that it need not search through "voluminous documents" that "did not appear relevant" to Koi, and that where Koi decided (again unilaterally) that Strategic could obtain them from other sources, it did not need to provide them. Notably, Koi had not, until the day before the hearing, told any of this to Strategic's counsel, despite Strategic's repeated attempts to meet and confer.

Mr. Husk also maintained that for many categories of documents, no documents existed. The Court expressed its skepticism, as the assertion was one "the Court had trouble believing if Koi operates as a legitimate business." [Dkt. 42, 1.] And, in any event, Koi had never provided responses to Strategic stating that no documents existed that were responsive to the categories of documents at issue. Given both Strategic's and the Court's distrust of Koi's statements in its declarations, the Court ordered Strategic to, among other things, "serve and file a declaration on **October 16, 2017**, stating what searches were performed" for responsive documents. [*Id*. at 2, emphasis in original.] Koi violated this order. It never provided such a declaration to counsel or the Court, let alone on October 16, 2017.

When granting Strategic's motion to compel in its entirety, the Court found that Koi had "refused to engage in meaningful dialog" and that Koi's failure to provide the requested discovery and its opposition to the motion, such as it was,

appeared to be without substantial justification. The Court invited Strategic Partners to file the First Sanctions Motion, which Koi also failed to oppose, despite being ordered to do so [Dkt. 42 at 4], so nothing has changed the Court's view of the proceedings. *See also* Local Rule 7-12. Given these circumstances, the Federal Rules require the Court to assess attorneys' fees and costs against Koi. Rule 37(a)(5)(A) is directly implicated, and none of the exceptions is subparts (i)-(iii) apply. The undersigned thus recommends that the District Judge order Koi to pay $26,615.02, the reasonable fees and costs incurred in bringing its motion to compel, to Strategic Partners.

II. Second Sanctions Motion – Terminating Sanctions Are Appropriate Because Koi Has Acted In Bad Faith In Violating Multiple Court Orders And Failing To Participate In Discovery, Resulting In Prejudice To Strategic Partners

Koi has violated several written Court orders and has not demonstrated, nor can it demonstrate, that its failures were outside of its control. *See Henry*, 983 F.2d at 948-49; *In re Phenylpropanolamine (PPA) Products Liab. Litig.*, 460 F.3d at 1233. Koi and its counsel have failed to appear when ordered and failed to file and serve required documents, including both oppositions to motions and declarations explaining their document production. Koi has refused to heed oral admonitions made on the record as well as failing to respond to Strategic's communications within a set time period even though Koi was ordered to do so during a telephonic hearing and despite the requirement that it do so, as set forth in the Court's Procedures. For most of these violations, Koi has offered neither explanation nor apology. Consequently, there is no question in the Court's mind that Koi's actions and inactions have been taken in bad faith under the test articulated by the Ninth Circuit in *Connecticut General*, *Henry* and other cases.

In addition, Koi has failed at every turn to follow the Federal Rules of Civil Procedure or this Court's Procedures and Schedules. Beginning with Koi's failure

to participate in the required Rule 26 conference of counsel and continuing through its failure to timely respond to discovery and refusal to engage with opposing counsel when Strategic's counsel attempted, over and over again, to meet and confer about multiple issues – ranging from interrogatories and responses to document requests to attempt to set a deposition schedule – Koi has resisted discovery and turned a blind eye to both procedural requirements and the rules of civility. The Court is not aware of a single instance when Koi ***did*** comply with its obligations in a timely and professional manner. Although Koi argues that it ***eventually*** complied with the Court's October 3 Order (or part of it, at least), Koi only did so months late after two sanctions motions were filed and the original discovery cutoff was nearly past. It tendered supplemental responses when it was too late for Strategic to challenge them, if still inadequate, or follow up in the normal course to obtain additional information to support its case. Moreover, last minute compliance does not cure prejudice or preclude sanctions. *North American Watch Corp.*, 786 F.2d at 1451. The Court must, thus, consider what sanction is appropriate in these circumstances.

In its Second Sanctions Motion, Strategic Partners seeks terminating sanctions, or in the alternative, certain preclusionary sanctions that, in the Court's view, amount to terminating sanctions. In an effort to craft preclusionary sanctions that are related to the specific discovery Koi failed to provide, Strategic requests, as an alternative to terminating sanctions, that Koi be precluded from disputing the following facts (paraphrased here):

(1) Koi was aware of Strategic Partner's pending trademark application when Koi launched its accused, allegedly infringing product line;

(2) Koi launched its line despite knowing that Strategic Partners had trademark priority;

(3) Koi and Strategic Partners sell the same items, specifically, scrubs, using their respective marks;

(4) the parties' scrubs are "the same type of goods" for purposes of trademark registration;

(5) consumers experienced actual confusion between scrubs sold under the parties' respective marks; and

(6) the parties sold their goods through the same marketing channels.

The Court agrees with Strategic Partners that these facts relate directly to Koi's discovery failures, and thus present an appropriate option for sanctions. They also, however, if found to be true, amount to a determination of liability. In other words, if Koi is precluded from contesting these facts, then liability would be directed, with only damages left to be determined. Consequently, the Court discusses below, in the context of applying the five-factor test set forth in *Valley Forge*, whether there are lesser sanctions available that would deter future bad behavior on the part of Koi and ameliorate prejudice to Strategic, or whether terminating sanctions are necessary in this case. Unfortunately, in this case, the Court believes that only terminating sanctions will suffice.

As the Ninth Circuit stated, when a court order – or, as here, several – have been violated, the first two factors, the public's interest in the expeditious resolution of the litigation and the court's need to manage its docket, weigh in favor of imposing terminating sanctions. *Adrianna*, 913 F.2d at 1412. The fourth factor, the public policy favoring disposition of cases on the merits, cuts against them. *Id.* The remaining factors are key: the risk of prejudice to the party seeking sanctions (the third factor) and the availability of less drastic sanctions (the fifth factor). *Id.; see also Wanderer*, 910 F.2d at 656.

Here, Koi delayed repeatedly, failed to respond to counsel and the Court repeatedly, failed to provide supplemental discovery responses or produce documents as ordered, and failed to explain under oath the procedure used to locate documents as ordered. The failure to produce documents as ordered, by itself, "is considered sufficient prejudice," so this agglomeration of failures to abide by any

set of rules – essentially a failure to participate in the litigation at all – certainly demonstrates sufficient prejudice. Strategic Partners' ability to go to trial and the Court's confidence that "the rightful decision of the case" obtained will have been irreparably impaired. *Adriana*, 913 F.3d at 1412. At this point, further continuation of case deadlines will not remedy the prejudice, either to Strategic, which would essentially have to start over after a year of litigation, or to the Court's calendar and ability to manage its docket.

The only remaining question is whether there are lesser sanctions available that would adequately serve the ends of justice. As discussed above, the Court cannot conceive of a non-terminating sanction that would ameliorate prejudice. Nor can the Court conceive of a lesser sanction that would cause Koi to "straighten up and fly right." Koi has already had many chances to do so. Although the Court has not previously assessed monetary sanctions, Koi and its counsel were not deterred by the Court's prior warnings and Orders to Show Cause why sanctions should not be levied. Koi then failed to respond to Strategic's First Sanctions Motion, even though the Court ordered Koi to file ***something***. And even after the Second Sanctions Motion was fully briefed – so that Koi knew without doubt that terminating sanctions were on the table – Koi continued its pattern of failure to cooperate in discovery, requiring the Court to issue yet another Order requiring Koi to explain itself. And – again in violation of a Court order – Koi's declaration in response to that Order did not address the specific issues mandated by the Court. Thus, there does not appear to be a sanction short of an order directing the entry of judgment on liability in this case that would serve the ends of justice.

In light of the posture of the case when the sanctions motions were fully briefed, the District Judge set a new discovery cutoff of April 24, 2018. [Dkt. 58, entered December 11, 2017.] That leaves the parties sufficient time to do whatever damages discovery is necessary, including any expert discovery, to prepare for a trial on the issue of the amount of damages.

CONCLUSION AND RECOMMENDATION

For all of the foregoing reasons, **IT IS RECOMMENDED** that the District Judge issue an Order:

(1) accepting this Report and Recommendation;

(2) granting Plaintiff's Motion for Monetary Sanctions [Dkt. 43] and ordering Defendant, jointly and severally with Defendant's counel, to pay Plaintiff $26,615.02 in fees and costs within 30 days of the District Court's Order;

(3) granting Plaintiff's Motion for Terminating Sanctions [Dkt. 49] and ordering judgment entered finding Defendant liable in this action.

DATED: January 23, 2018

GAIL J. STANDISH
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the United States Court of Appeals for the Ninth Circuit, but may be subject to the right of any party to file objections as provided in the Local Civil Rules for the United States District Court for the Central District of California and review by the United States District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until the District Court enters judgment.